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Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

United States of America,

Plaintiff,

VS.

Jason Langlois,

Defendant.

NO. CR-05-0351-TUC-RCC (CRP)

OBJECTION TO DRAFT PRE-SENTENCE REPORT AND SENTENCING MEMORANDUM

**(Sentencing Date Set For
December 13, 2005 at 8:40 p.m.)**

Defendant, JASON LANGLOIS, offers this objection for the court's consideration at time of sentencing. Defendant brings this objection pursuant to *Blakely v. Washington*, 124 S. Ct. 2531 (2004); *United States v. Booker*, __U.S. __, 125 S.Ct. 738 (2005); and *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005). Specifically, defendant objects to the sentencing recommendation of 70 months and to paragraphs 66 and 67 of the presentence report (“PSR”), insofar that they identify no factors under 18 U.S.C. §3553(a) that justify a sentence outside of the advisory guideline range, and reflect no investigation into or discussion of the listed statutory factors that the Court must

1 consider prior to imposing sentence. As will be shown, a multitude of statutory factors
2 justify the imposition of 30 months, a mitigated sentence within the stipulated range.

3 Additionally, defendant has filed mitigation letters for the Court's consideration prior to
4 sentencing in this cause.
5

6 Pursuant to Rule 32(i)(1)(D) and (i)(2), Fed. R. Crim. P., *United States v.*
7 *Ameline*, 409 F.3d 1073 (9th Cir. 2005), *United States v. Williams*, 41 F.3d 496 (9th Cir.
8 1994); *United States v. Navarro*, 979 F.2d 786, 789 (9th Cir. 1992); and *United States v.*
9 *Howard*, 894 F.2d 1085,1090 (9th Cir. 1990), the defendant moves the Court for an
10 opportunity to introduce testimony or other evidence at sentencing in support of this
11 objection. This objection is supported by the accompanying *Memorandum of Points and*
12 *Authorities*.
13
14

15 **RESPECTFULLY SUBMITTED:** December 11, 2005.

16 JON M. SANDS
17 Federal Public Defender
18

19 _____
20 W. ERIC RAU, ESQ.
21 Assistant Federal Public Defender

22 Copy to: Judson T. Mihok
23 Assistant United States Attorney
24
25 Guillermo Peña
26 United States Probation Office
27
28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. PROCEDURAL BACKGROUND/HISTORY OF THE CASE:**

3
4 Defendant Jason Langlois pled guilty on June 23, 2005 to Count Three of the
5 Indictment in this case, which charged him with Possession of Child Pornography, a
6 felony, in violation of 18 U.S.C. §§ 2252(a)(5)(B) and (b)(2). The stipulated sentencing
7 range in the plea agreement that Mr. Langlois accepted was 30 to 60 months, conditioned
8 upon Mr. Langlois' having no prior convictions and receiving a lifetime term of
9 supervised release.
10

11 The assigned Assistant United States Attorney in this case has explained to defense
12 counsel that the plea agreement's stipulated sentencing range is standard for similarly
13 situated defendants in the Tucson Division of the Federal District of Arizona. The lower
14 end of the range (30 months) reflects the fact that this is approximately the minimum
15 sentence a defendant could receive for this offense in order to wait out the approximately
16 10-month wait list for sex offender treatment at the FCI Butner facility in North Carolina
17 and still have at least 18 months remaining on his sentence, as FCI Butner requires for
18 inmates to enter the treatment program. The upper end of the range (60 months) reflects
19 the mandatory minimum sentence of five years that a defendant would face if other
20 counts in the Indictment had not been dismissed as part of the plea agreement.
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23 The Government's attorney has also explained to defense counsel that the standard
24 offer can include a 30-month bottom term or a 40-month bottom, depending on the
25 defendant's history, cooperativeness with authorities, and other characteristics. The
26 decision to offer Mr. Langlois a 30-month bottom plea term rather than a 40-month term,
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28

1 was based in part on factors such as Mr. Langlois' cooperation with authorities, stable and
2 responsible military and employment background, sincere remorse and positive prognosis
3 for rehabilitation.
4

5 Defense counsel received a draft copy of the PSR around November 27, 2005,
6 mailed a copy to Mr. Langlois in Phoenix on November 28, and later reviewed the report
7 with Mr. Langlois by telephone. There were no factual objections to the contents of the
8 PSR or to the preliminary guideline calculations for the statute to which Mr. Langlois
9 pled guilty. Defense counsel received the final version of the PSR with the sentencing
10 recommendation while defense counsel was out of the office on December 6, 2005.
11

12 Defense counsel returned to work on December 8 and reviewed the recommendation with
13 Mr. Langlois by telephone.
14

15 The Probation Office has recommended a sentence of 70 months, a mitigated term
16 at the bottom of the advisory guideline range of 70 to 87 months, according to its
17 calculations. This sentencing recommendation is above the stipulated plea range and does
18 not take into account the six other enumerated statutory factors that this Court must
19 consider in sentencing Mr. Langlois.
20

21 **II. LAW:**

22 **A. The New Sentencing Approach—Thinking Outside the Guidelines.**

23
24 In United States v. Booker, 125 S. Ct. 738, 2005 WL 50108 (Jan. 12, 2005),
25 the Court found the mandatory enforcement of the United States sentencing guidelines to
26 be unconstitutional, but it preserved the guideline sentencing scheme by severing those
27 provisions of the Sentencing Reform Act that made the guidelines mandatory.
28

1 Consequently, the guidelines are now “effectively advisory,” [125 S. Ct. at 757; *United*
2 *States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005)], and the standard of appellate review is
3 no longer *de novo* but one of reasonableness. As modified, sentencing courts are to
4 “consider” Guidelines ranges, *see* 18 U.S.C. §3553(a)(4), but are permitted to tailor
5 sentences in light of other statutory concerns. *See* §3553(a); *Booker*, 125 S.Ct. at 757-69.
6 In other words, sentencing courts, “while not bound to apply the guidelines, must consult
7 those guidelines and take them into account when sentencing.” *See* 18 U.S.C.A. §§
8 3553(a)(4), (5) (Supp. 2004). *Id.* at 767.

11 Under *Booker’s* remedial scheme, courts should follow the same procedures
12 already employed under the guidelines of first resolving all disputes about the application
13 of the guidelines in compliance with Fed. R. Crim. P. 32(i) and then determining the
14 advisory guideline range. By the terms of 18 U.S.C. § 3553(a), the court must arrive at
15 and “impose a sentence sufficient, but not greater than necessary, to comply with the
16 purposes of sentencing set forth” here:
17

18 (2) the need for the sentence imposed—
19

20 (A) to reflect the seriousness of the offense, to promote respect for
21 the law, and to provide just punishment for the offense;

22 (B) to afford adequate deterrence to criminal conduct;

23 (C) to protect the public from further crimes of the defendant; and

24 (D) to provide the defendant with needed educational or vocational
25 training, medical care, or other correctional treatment in the most
26 effective manner.
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1 18 U.S.C. § 3553(a)(2). In doing so, the court is called upon under the statute to consider
2 these other relevant factors:

3 (1) the nature and circumstances of the offense and the history and
4 characteristics of the defendant;
5

6

7 (3) the kinds of sentences available;

8 (4) the kinds of sentence and the sentencing range established for–
9

10 (A) the applicable category of offense committed by the
11 applicable category of defendant as set forth in the guidelines
12

13 . . . ;

14 (5) any pertinent policy statement . . . [issued by the Sentencing
15 Commission];

16 (6) the need to avoid unwarranted sentence disparities among
17 defendants with similar records who have been found guilty of
18 similar conduct; and
19

20 (7) the need to provide restitution to any victims of the offense.

21 18 U.S.C. § 3553(a). Thus, § 3553(a) instructs a sentencing court to consider the
22 established guideline sentencing range, listed as (4), as simply *one* of the many statutory
23 factors relevant in arriving at “reasonable” sentence.
24

25 Under the Act as modified, “district courts, while not bound to apply the
26 guidelines, must consult those guidelines and take them into account when sentencing.”
27 *Booker*, at 767. As a result, the sentencing guidelines’ strict limitations on the factors a
28

1 court may consider in sentencing below the guidelines -- e.g., the impermissible grounds
2 for departure set forth in U.S.S.G. § 5K2.0(d) -- no longer constrain the Court's discretion
3 in fashioning any sentence, as long as it falls within the statutory range. Instead, the
4 District Court must consider all of the statutory factors and purposes, including any that
5 were formerly prohibited under the guidelines, 125 S. Ct. at 764-65. Courts may impose
6 a non-guideline sentence if such is justified by the § 3553(a) factors. *See United States v.*
7 *Crosby*, 397 F.3d 103, 112-13 (2d Cir.2005). A non-guideline sentence need not be
8 supported by factors that would have justified a departure under the old, mandatory
9 regime, *United States v. Ranum*, 353 F.Supp.2d 984, 986-87 (E.D.Wis.2005); and the
10 court need not definitively resolve any departure issues if it has decided to impose a non-
11 guideline sentence. *Crosby*, at 112.

15 **B. Section 3553 Factors Often Justify a “Variance”.**

16 When courts consider all statutory factors relevant to sentencing, it may
17 often be necessary to tailor a sentence that constitutes a “variance” from the advisory
18 guideline range or guideline table “zones”. This can happen when statutory factors
19 contradict guideline prohibitions. For example, the guidelines’ prohibition that the court
20 not consider a multitude of personal characteristics of the defendant (see list of prohibited
21 personal characteristic factors under Sections 5H1.1-5H1.12 of the Guidelines) cannot be
22 squared with the §3553(a)(1) requirement that the court evaluate the “history and
23 characteristics” of the defendant. Thus, in cases in which a defendant’s history and
24 character are positive, consideration of all of the §3553 factors might call for a sentence
25 outside the guideline range. *United States v. Ranum*, 353 F.Supp.2d 984, 987-88 (E.D.

1 Wis. 2005).

2 Second, §3553(a)(2)(D) requires a sentencing court to evaluate the need to
3 provide the defendant with education, training, treatment or medical care in the most
4 effective manner. This directive may conflict with the guidelines which often mandate a
5 prison term. Additionally, §3553(a)(7) directs courts to consider “the need to provide
6 restitution to any victims of the offense.” In many cases, imposing a sentence of no or
7 only a short period of incarceration will best accomplish this goal by avoiding disruption
8 of a defendant’s work and allowing the defendant to pay back the victim. Finally, interest
9 in general deterrence (the need to send a general message to the public) may become
10 secondary to the need for *individual* deterrence under §3553(a)(2)(C), which takes into
11 account unique circumstances of an individual defendant. *Ranum, Id.*

12 Subsequent to the *Booker* decision, many courts are now imposing variant¹
13 sentences under this new sentencing regime in cases where the guidelines prove too strict
14 or traditional departure grounds are unavailable. For example, in *United States v.*
15 *Anderson*, 2005 WL 914427 (D.Me.: April 20, 2005), the Court imposed a split Zone C
16 sentence for a defendant that technically fell into a Zone D sentencing range. *See*, also
17 *e.g., United States v. Pimental*, 367 F.Supp.2d 143 (D.Mass. Apr. 21, 2005) (sentence of
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24 ¹ The adjective “variant” is used in this memo to describe such sentences because courts are
25 now free to fashion sentences outside of the guideline range even where no grounds for traditional
26 “departure” exist if analysis of §3553 factors make the sentence “reasonable”. Continuing to call
27 §3553 sentences that fall outside of the guidelines “departures” inappropriately inflates the
28 importance of the formerly mandatory guideline regime, and it is tantamount to incorrectly treating
the guidelines as “presumptive” instead of “advisory”. The guidelines, after *Booker*, are just *one*
of many statutory factors to be considered, and the non-existence of guideline departure grounds
does not preclude imposition of any reasonable sentence within the broader statutory range.

1 probation held to be “sufficient, but not greater than necessary, to comply with purposes”
2 of sentencing factors listed under 18 U.S.C. § 3553(a)); *Simon v. United States*, 361
3 F.Supp.2d 35 (E.D.N.Y. 2005) (Court declines to apply sentencing guideline’s 100-1 ratio
4 in sentencing defendant for distribution of crack cocaine, reasoning that “respect for the
5 law, and just punishment counseled a more lenient sentence than the Guidelines
6 recommended”); *United States v. Jaber*, 362 F.Supp.2d 365, *381 (D.Mass., 2005)
7 (variance justified for one defendant where differences in sentencing calculations “were
8 driven not by differences in the crime, but by the happenstance of the way the
9 government indicted, the jurisdictions of indictment, and who ran to cooperate first”. A
10 sentence of probation and home detention in lieu of guideline’s 57-71 month range was
11 appropriate for second defendant whose pre-trial release record was “perfect” despite
12 personal stressors of sick wife and inability to find work, *Id.* at 383); *United States v.*
13 *Smith*, 359 F.Supp.2d 771, 782 (E.D.Wis. 2005) (Even after partially rejecting the
14 advisory guideline and Commission's recommendations regarding crack cocaine, court
15 believes “the range to be somewhat greater than necessary because it did not take into
16 account defendant's good conduct since he committed this offense over four years ago, his
17 employment history and community involvement, and his importance to his family”. In
18 so holding, the court considers three general categories of §3553 factors: 1) the nature of
19 the offense, 2) the character of the defendant, and 3) the needs of the public); *United*
20 *States v. Mullins*, 356 F.Supp.2d 617 (W.D.Va. 2005) (Court holds that de-criminalization
21 of weapons offense justifies a sentence below the advisory guideline range); *United States*
22 *v. Galvez-Barrios*, 355 F.Supp.2d 958, 964 (E.D.Wis. Feb.2, 2005) (Court analyzes

§3553 factors and concludes that defendant's good character and honorable motive for re-entering country justify a sentence below the advisory guideline range in an illegal re-entry case reasoning that "courts need not strictly justify sentences by reference to the guidelines or identify non-heartland factors to justify sentences above or below the guideline range"); *United States v. Myers*, 353 F.Supp.2d 1026, 1028 (S.D. Iowa, 2005) (Guidelines are not presumptive, but only advisory, and should be treated as one factor to be considered in conjunction with other factors that Congress enumerated in section 3553(a); court finds that defendant's actions, character, and history including lack of need of rehabilitation and excellent pre-trial release record combine to justify a 3-month probationary sentence and not the advisory guideline sentence of between 20 and 30 months); *United States v. Ranum*, 353 F.Supp.2d 984, 991 (E.D. Wis. 2005) (variant sentence of one year and a day instead of guidelines' 37-46 month range appropriate after considering §3553 factors); *United States v. Jones*, 352 F.Supp.2d 22, 26 (D.Me. 2005) (analysis of §3553 factors justifies a variance from a "Zone D", 12-18 month sentencing range to a "Zone C" split sentence of time served and home confinement even though traditional guidelines analysis does not warrant downward departure).

Finally, under 18 U.S.C. § 3582, imposition of a term of imprisonment is subject to the following limitation: in determining whether and to what extent imprisonment is appropriate based on the Section 3553(a) factors, the judge is required to "recogniz[e] that imprisonment is *not* an appropriate means of promoting correction and rehabilitation". (emphasis added)

III. ARGUMENT:

1 The recommended sentence of 70 months is outrageous, given the facts of
2 this case. The PSR includes advisory guidelines calculations but utterly ignores the other
3 statutory factors that this Court must consider, and treats the guidelines as if they were
4 mandatory and *Booker* did not exist. The foregoing factors justify a sentence of 30
5 months, because under any reasoned application of all §3553 sentencing factors, a
6 mitigated sentence within the stipulated range is justified. Given the factual and
7 procedural history of this case, and the personal history and characteristics of this
8 defendant, it is simply the most just and reasonable thing to do.
9

10
11 **IV. CONCLUSION:**

12 For the above-stated reasons, the court should impose a sentence of 30 months,
13 which is a mitigated term within the stipulated range.
14

15 **RESPECTFULLY SUBMITTED:** December 11, 2005.

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17 Federal Public Defender

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